



U.S. Citizenship  
and Immigration  
Services

[REDACTED]

H2

DATE: DEC 19 2012 OFFICE: LAS VEGAS

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:  
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Field Office Director, Las Vegas, Nevada and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Germany who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for gaining admission to the United States through fraud or misrepresentation. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative and denied the application accordingly. *See Decision of the Field Office Director*, dated May 3, 2010.

On appeal, counsel for the applicant asserts that the applicant's spouse's emotional state has deteriorated and that the applicant's work would provide a benefit to the United States. Counsel also asserts that the applicant did not gain entry to the United States through fraud or misrepresentation because he was not aware that he had committed a crime involving moral turpitude and that, further, the applicant has not been convicted of a crime involving moral turpitude.

In support of the waiver application and appeal, the applicant submitted a psychological report concerning his spouse, documentation concerning the applicant's work, financial and identity documents, affidavits from the applicant and his spouse, letters of support, family photographs, and court records concerning the applicant's criminal history. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of

conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703. Finally, in all such inquiries, the burden is on the alien to establish “clearly and beyond doubt” that he is “not inadmissible.” *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

The record reflects that the applicant was convicted in the 9<sup>th</sup> Criminal Division of the Augsburg Regional Court, Germany, of 79 counts of fraud on February 5, 2003. The applicant was sentenced to two suspended years in prison, four years of probation, and ordered to pay restitution.

Counsel for the applicant asserts that the applicant was not convicted of a crime involving moral turpitude because he was convicted of fraud under a divisible statute. Specifically, counsel contends that the applicant was convicted under a statute that contains three separate offenses and provides translated text of Germany’s fraud statute: “Whoever intends to obtain for themselves or a third part an unlawful pecuniary advantage, damages the assets of another by fraudulent misrepresentation or creates or maintains an error by distorting or suppressing of true facts will be penalized with a custodial sentence of up to five years or a monetary fine. Counsel asserts that the three offenses prohibited under this statute are not all crimes involving moral turpitude and that there exists no further record to clarify which offense was committed by the applicant.

Section 263 of the German Criminal Code provides, in pertinent part:

Fraud

(1) Whoever, with the intent of obtaining for himself or a third person an unlawful material benefit, damages the assets of another, by provoking or affirming a mistake by pretending that false facts exist or by distorting or suppressing true facts, shall be punished with imprisonment for not more than five years or a fine.

Counsel does not cite the source of his translated version of the German Criminal Code. However, it is noted that the translated fraud statute relied upon by the AAO originates from the German Federal Ministry of Justice. Further, it is plain from the statute text that section 263(1) of the German Criminal Code punishes fraud by an individual who damages another’s assets to gain an unlawful material benefit by pretending that false facts exist or by distorting or suppressing true facts. In this section of Germany’s fraud statute, the intent to defraud is an explicit statutory element that must be satisfied for a conviction under this section. Crimes that require the intent to defraud have been held, as a general rule, to involve moral turpitude. *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992). Accordingly, the AAO finds that the applicant has been convicted of a

crime involving moral turpitude, and he is inadmissible under section 212(a)(2)(A) of the Act. He requires a waiver under section 212(h) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The Field Office Director also found the applicant to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for procuring entry to the United States by fraud or willful misrepresentation. Subsequent to the applicant's conviction for crimes involving moral turpitude on February 5, 2003, he made entries into the United States pursuant to the visa waiver program. On the applicant's Form I-94W, upon each entry, he failed to disclose that he had been convicted of a crime involving moral turpitude.

Counsel for the applicant asserts that the applicant was assured at the time of his criminal disposition that his plea would not affect his ability to conduct business in the United States. As a result, counsel contends that the applicant was never aware that his conviction was for a crime involving moral turpitude that would limit his business travels to the United States. Counsel further asserts that the applicant was careless in his failure to investigate the impact of his criminal conviction, but that he did not make a knowing misrepresentation to gain entry to the United States.

U.S. Citizenship and Immigration Services interprets the term "willfully" as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *See generally Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). To be willful, a misrepresentation must be made with knowledge of its falsity. 7 I&N Dec. at 164. To determine whether a misrepresentation was willful, we examine the circumstances as they existed at the time of the misrepresentation, and we "closely scrutinize the factual basis" of a finding of inadmissibility for fraud or misrepresentation because such a finding "perpetually bars an alien from admission." *Matter of Y-G-*, 20 I&N Dec. 794, 796-97 (BIA 1994) (citing *Matter of Shirdel*, 19 I&N Dec. 33, 34-35 (BIA 1984)); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979).

With relevance to the present matter, we acknowledge that the term "moral turpitude" is not in common usage, and it is unlikely that the average person is aware of its meaning and application in U.S. immigration law. Nevertheless, as the burden is on the applicant to establish that he or she is not inadmissible, the applicant has the burden of showing that any misrepresentation was, in fact, not willful. *See* section 291 of the Act, 8 U.S.C. §

1361. Based on the evidence in the record, the AAO finds that the applicant did not willfully misrepresent a material fact to procure entry to the United States and is not subject to inadmissibility pursuant to section 212(a)(6)(C) of the Act. However, as noted above, the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of

factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily

separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The applicant is a 57 year-old native and citizen of Germany. The applicant's spouse is a 51 year-old native of Italy and citizen of the United States. The applicant and his spouse are currently residing in Las Vegas, Nevada.

The applicant's spouse asserts that the applicant is the most important person in the world to her and that she never wants to lose him. The record contains two psychology reports concerning the applicant's spouse. The first evaluation, dated December 29, 2009, states that the applicant's spouse underwent emotional abuse in her first two marriages and that she was experiencing fear and agitation at the threat of losing the applicant. The psychotherapist, in 2009, determined that the applicant's spouse was at an elevated risk for suicide and more serious depression. The more recent evaluation, dated May 20, 2010, follows the applicant's notification of the denial of his waiver application. The evaluation states that the applicant's spouse asserted that she did not want to live if her husband returned to Germany. The psychotherapist further states that the applicant's spouse exhibited more pronounced symptoms of a dependent personality, more emotional distress, and suffered from some suicidal ideation. It is also noted that the applicant's spouse's anxiety and depression scores rose and that her hopelessness score went from four to 17. The psychotherapist's assessment finds that the applicant's spouse suffers from severe depression with high risk of suicide, severe anxiety with panic, and sleep disturbance of the primarily insomnia type. It was recommended that the applicant's spouse be monitored and seek appropriate medication and follow-up.

Counsel for the applicant asserts that the applicant's spouse is a housewife in the United States and does not need to work due to her the applicant's financial support. Counsel contends that the applicant's spouse would suffer a loss of income if the applicant's employment relationship in the United States ended. It is noted that the record contains an affidavit from [REDACTED] stating that his business compensated the applicant through use of a home, cell phones, automobiles, attorneys' fees, and royalties. It is also noted that [REDACTED] affidavit states that the applicant's German company is providing the applicant with his salary. There is insufficient evidence to determine that the applicant's spouse would be unable to rely upon the applicant to fulfill her financial obligations in the United States if he returned to Germany. However, in the aggregate, the evidence is sufficient to find that the applicant's spouse would suffer extreme hardship beyond the common results of inadmissibility or removal if she were separated from the applicant.

The applicant's spouse asserts that she is a native of Italy and has resided in Germany, but does not wish to relocate to either country. The psychotherapist's evaluation of the applicant's spouse from 2009 states that the applicant's spouse has spent as much time in Italy and the United States as she has in Germany. The evaluation states that the applicant's spouse now considers the United States to be her home so that she would undergo considerable trauma if she left and she has not developed any useful job skills that would prepare her for employment in other countries.

It is noted that the applicant's spouse asserts that during her time in Germany, her work was her passion, as she had a great job with high income. The applicant's spouse also states that she joined a company as a secretary, but moved up the ranks to executive bookkeeping, until she was overseeing payroll for over 400 people five years later. Counsel for the applicant asserts that Germany is experiencing economic decline that would result in financial hardship for the applicant's spouse if she relocated with the applicant. However, the record contains information that the applicant is receiving current salary payments from his company in Germany and there is no indication that these payments would cease. Further, the record indicates that the applicant's spouse has proven economically successful while residing in Germany. As such, upon relocation, the applicant's spouse would return to a country in which she previously resided with employment and, as stated by the applicant's spouse, close friends and family members. It is noted that the psychotherapist's evaluation states that the applicant's spouse emigrated with her parents from Italy to Germany when she was nine years old and has siblings currently residing in Germany. The applicant's spouse also stated that she resided in Germany for over 30 years. The record contains insufficient evidence to find that the applicant's spouse would suffer hardship beyond the common consequences of inadmissibility or removal if she relocated to Germany.

Although the depth of concern and anxiety over the applicant's family's circumstances is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. While the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists.

The applicant has demonstrated that his spouse would suffer extreme hardship upon separation from her husband. The record, however, does not contain sufficient evidence to show that the hardships faced by the qualifying relative upon relocation, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining in the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship upon relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(h) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits this waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed and the underlying application will remain denied.

**ORDER:** The appeal is dismissed.